COMMUNICATIONS LAW BULLETIN

The Official Publication of the Australasian Communications Law Association (ACLA)

ISSN 0705-9043 EDITED BY JOHN MANCY *LLB* Vol. 1 No.1 April 1981

Cable Television: Prometheus of Parliament

By MARK ARMSTRONG
Senior Lecturer in Law
University of N.S.W.

Cable antenna television (CATV) licences are severely limited by the *Broadcasting and Television Act* 1942 (Cth.). Broadly speaking, 130A allows them to be granted only where there is inadequate reception of existing radiated television services.

Section 130A(8) of the Act in effect prohibits the use of a cable to further transmit material transmitted by a radio or television station except:

a) on private land;
b) pursuant to a CATV licence granted under S.130A itself; or
c) for the purpose of further radiated transmission.

The restriction was originally introduced in 1949 by S.2 of the *Post and Telegraph Act* 1949.

Mr Arthur Calwell, the Minister for Information, explained to the House of Representatives that the restriction had been prompted by the applications of English interests to provide cable broadcasting services in Australia: *Cth.Parl.Debs.* (H of R) 30 June 1949 vol.203 p.1864.

The intention was to restrict cable "for a period of some months or perhaps a year or so" to enable it to be fully investigated: *id.* p.2164.

He admitted that existing radio interests had exerted pressure on the Government to introduce the restriction: *id.* p.2168..

The Opposition attacked the Government for bowing to vested interests and inhibiting new services, but did not remove the restriction when elected to Government.

This is but one of many ways in which the law has been used to prevent competition with established interests.

CATV services in the United States rapidly developed into cable television systems which select or originate their own programmes instead of merely conveying the programmes of radiating stations.

Cable TV is a major industry overseas.

Section 130A(8) does not prohibit the transmission by cable of programmes not transmitted by a TV station.

It probably does not restrict transmission to the audience by cable of programmes which originate in the studio of a TV station, provided that the cable does not transmit the same signal as is radiated by "conventional" means.

Under the *Telecommunications Act* 1975 (Cth.) Telecom has the powers appropriate for installation and maintenance of cable broadcasting.

In 1974 the Broadcasting Control Board and the Australian Post Office produced their report to the Minister for the Media entitled *Cable Television Services in Australia.*

That Report collected some useful information about cable, but did not recommend early use of cable to provide new television services.

Telecom 2000, the 1975 report on future telecommunications' needs produced by Telecom, contains recommendations for the introduction of cable TV at pp.19-21, 82-9.

These are supplemented by views expressed in *Outcomes from the Telecom 2000 Report* of 1979 at pp.55-7. The *Outcomes* report said:

"The impression has often been given that cable television will bring more entertainment to the masses, more profits to business, and solutions to problems in education, social welfare and community development. "In addition, other services such as mobile telephones might use the radio frequency spectrum made spare if all television were in cable. The chapter on cable television in *Telecom 2000* was intended to present a much more cautious attitude to the subject, weighing the various arguments that have been put forward. We had no intention that *Telecom 2000* should promote cable television in Australia".

Among other things, *Telecom 2000* recommended that one channel in

Continued Page 2

Communications Law Bulletin

This is the official publication of the Australasian Communications Law Association (ACLA), whose members include lawyers and lay-people from the full spectrum of interests in communications. It will be published quarterly, in April, July, October and December. It may also be published at other times. For subscription and membership details, see page 4.

In this issue

This first issue of CLB looks briefly at particular aspects of the law affecting cable TV and photocopying.

LUNCHEONS

The Chairman of the Australian Broadcasting Tribunal, Mr David Jones will speak to an ACLA luncheon, on 24th April, on the role of lawyers in the regulation of broadcasting.

The venue will be the Menzies Hotel, Sydney, from 12.30 p.m.

Members of ACLA will be contacted with further details.

On 20th March, Senator John Button, A.L.P. Spokesman on Communications, addressed an ACLA luncheon on current developments in media regulation.

A comprehensive report on this address will appear in the next issue of the Communications Law Bulletin.

Registered for postage as a publication. Category B. Printed by Beaver Press, 29 Alberta Street, Sydney 2000. Inquiries and contributions to: The Editor, Australasian Communications Law Bulletin, C/- Faculty of Law, University of N.S.W., P.O. Box 1, Kensington N.S.W. 2033.

Copyright Amendment Act 1980

PETER BANKI, Legal Research Officer of the Australian Copyright Council, in a paper given at a recent ACLA seminar, looks at some of the key developments in Copyright Law ....

Photocopying has revolutionised the use of authors' works. It has been the focus of international debate on copyright and its philosophical base since the early 1960s.

With the possible exception of television and radio broadcasting, the photocopying machine has been the most significant technological development for copyright since sound recordings were invented. Legislators of copyright have certainly found it the most difficult to cope with.

Australia's first attempt to analyse the copyright implications of photocopying machines were the judicial statements in the *Moorhouse* case in 1974 and 1975. The Franki Committee was established soon after the first instance decision in that case and reported to the Attorney-General in 1976. The present amendments are the result of the Government's decisions on the Committee's recommendations.

The new Act is premised on the notion that copyright legislation requires a balancing of the private interests of copyright owners and the public interest of users of copyright material. This is the popular view of copyright as a limited monopoly property right, expressed only in terms of economic exploitation.

The Act was passed by Parliament on 18 September 1980 and received Royal Assent on 19 September. It deals with two main issues: provision for a systematic approach to photocopying; and increased penalties for summary offences.

The Photocopying Amendments

These provisions are not yet in force. They will come into operation on a date to be fixed by proclamation — probably in April 1981 — to allow a period for users and copyright owners to design their photocopying record systems and to instruct staff.

The key provisions are:

- a mimimum quantitive definition of "reasonable portion" (Section 5 — Section 10 of the Principal Act)

- a broader fair dealing exception permitting single copies of reasonable portions of works (S.7 — Section 40 of the Principal Act)

- more comprehensive library copying provisions (Sections 10, 11 and 12 — Sections 49 and 50 and new Section 51A of the Principal Act)

- a statutory licensing system for multiple copying in educational institutions and institutions assisting handicapped readers (Section 14 — new Divisions 5A and 5B in Part III of the Principal Act)

- requirements for the retention and inspection of copying records (Section 27 — new Sections 203A — G of the Principal Act)

Section 53B is the most important photocopying provision. It provides that educational institutions may make multiple copies of the whole or part of periodical articles and of works. Such copying is to be recorded, the records kept (new Section 203) and owners have a right to claim payment, except for some copies for external students.

The form of operation of this statutory licence is that multiple copying within specified limits is not an infringement of copyright if records of copying are kept. The limits are based on the formula used in other parts of the Bill, that of copying of no more than a reasonable portion except where the work is unavailable.

The operation of the statutory licence will depend largely on the effectiveness of record-keeping and on the extent to which copying under this heading can be isolated from other copying, particularly copying under Section 53A. Section 53A deals with multiple copying of insubstantial portions of works (1% or 2 pages every 14 days).

Unlike some of the other copying provisions, persons who make copies of works under Section 53B are not required to make a declaration. It is only required that they be "satisfied, after reasonable investigation" that the work is unavailable. Institutions which may use the statutory licence are resource centres and other educational institutions. These are defined in Section 10 of the Principal Act.

The Penalties Amendments

Section 133 is amended to provide for increased penalties on conviction of a summary offence. These have been increased to $150 per article in the case of articles other than a cinematograph film and $1,500 in the case of a cinematograph film. The maximum fines are $1,500 per transaction and, for prosecutions in the Federal Court, $10,000. The maximum penalty under Section 133(3) (possession of plates used for making infringing copies) is also increased to $1,500. "Recording equipment" is included in Section 133(4).

The amendments came into operation on 19 September.

Other Amendments

These include:

- modification of the Crown's prerogative rights (Section 4 of the new Act) and provision for copying "prescribed works" (Section 8) and a similar provision in Part IV of the Act (Section 15).

- requirements that members of the Copyright Tribunal disclose interests (Section 19) and provisions conferring jurisdiction on the Tribunal to hear applications.

(a) determining remuneration under the statutory licences (Section 20)

(b) making orders suspending the application of the licence (Section 21).

- clarification of the meaning of Section 183 of the Act (Section 24).

- a defence in relation to copying under Sections 49, 50, 51A, 53B, or 53D by notation of copies (Section 27 — new Section 203H of the Principal Act).

- amendments relating to copies of sound recordings and other formal amendments (Section 28).

On March 23 this year, the Prime Minister, Mr Fraser, is reported to have said in Melbourne that the enabling legislation would come into effect on July 1st or as soon as possible after that date — **Ed.**

Cable Television: Prometheus of Parliament

cable systems should be reserved for public access, that Telecom should own the physical transmission plant and that capacity should be leased to interests such as commercial entrepreneurs, institutions and community groups: p.89.

Clearly, proposals for the widespread introduction of cable raise major policy issues.

Apart from the issue of who will own the plant, it will be necessary to weigh the current control of commercial broadcasting in the balance to determine how, if at all, the ownership and control provisions of the B & T Act should be extended to cable TV.

The large number of potential programme choices available through cable may call into question the validity of a scarcity of frequencies as one of the rationales for regulation of broadcast programmes.

Cable also calls into question the current definition of broadcasting in S.4 of the B & T Act.

Although the principal use of cable overseas is still to convey broadcasts to the home, the reference to "wireless telegraphy" in the definitions of "broadcasting station" and "television station" in S.4 of the B & T Act has the ultimate effect of excluding cable systems because they involve a physical connection between transmitter and receiver.

But even if S.4 were amended to remove the reference to "wireless telegraphy", there would be the more fundamental problem that cable TV programmes are not necessarily intended for reception by the general public.

The cable audience consists of all those who have arranged for connection to the branch cable; an ascertainable audience.

Arguably, the cable audience is the general public where the connection is available on application to anyone who pays a standard attachment fee.

The cable issue is only the watershed of the more general flood of issues which will arise from the increasing convergence of modes of communication.

For example, a German study has suggested that the domestic "television receiver" could be used as the visual display unit for thousands of different technical applications: K. Haefner & others "New Uses for the TV Set" *Intermedia* Sept. 1978 vol.6 no.5 p.15. As E.W. Ploman says in "Teletext Arrives — But What is Teletext?" *Intermedia* Feb. 1978 vol.6 no.1 p.32:

> Some have spoken of new services lying in "the grey area between telecommunications and broadcasting". In this view, the new services are like broadcasting in that they make information widely available but like telecommunications in their use of switching technology to allow the user to select from information sources.

The "receiver" is likely to be linked with a full alphanumeric keyboard or intelligent telephone to provide exchanges of communication with a network of central data banks and computers. It may be used for teleconferencing; seminars; banking; shopping; and viewing of individually selected programmes: see generally W.S. Baer "Telecommunications Technology in the 1980s" in Glen O. Robinson (ed.) *Communications for Tomorrow* New York 1978 at pp.61-123.

The dependence of nearly all media in future on wired or radiated electronic communication will in economic reality bring the press within the power of the Commonwealth Parliament. It is the Commonwealth which has power to make laws about "postal, telegraphic, telephonic and other like services" under S.51(v.) of the Constitution.

TERMS OF REFERENCE

The terms of reference of the Australian Broadcasting Tribunal inquiry into cable and subscription television services were announced by Mr A. Staley on 9 July, 1980:

Terms of reference

I, Anthony Allan Staley, Minister of State for Post and Telecommunications, in pursuance of section 18 of the *Broadcasting and Television Act* 1942 ('the Act'), hereby direct the Australian Broadcasting Tribunal to hold an inquiry into the following matters to the extent that those matters relate to the operation of the Act or the regulations under that Act or otherwise to the provision of broadcasting or television services:

1. The social, economic, technical, and related, matters that need to be taken into account in introducing cable television into Australia.

2. The range and diversity of services (including sound broadcasting and 'pay-TV' and other subscription services) of an entertainment, information, educational or other kind that could be provided by means of, or in association with, cable television.

3. The level of interest of potential operators in providing services of kinds referred to in paragraph 2 above, and of potential consumers in receiving such services.

4. The means by which potential operators would propose to establish and operate systems for the provision of cable television and associated services.

5. Optimum dates for the introduction of cable television, having regard to the present state of development of cable technology, including fibre optics.

6. The effect that the introduction of radiated 'subscription television' services would be likely to have on any 'pay-TV' services provided by cable television systems.

7. The effect of the introduction of cable television on existing broadcasting and television services, including any effect on the viability of commercial broadcasting stations and commercial television stations.

8. The effect of the introduction of cable television on the production in Australia of programs, films and other material designed or suitable for television, and the employment of persons in connection therewith.

9. Whether any private operators of cable television systems that might be permitted should be subject to licensing, ownership and control, and other regulatory, requirements of the kind that apply in relation to commercial broadcasting stations and commercial television stations or, alternatively, whether other provisions should be made in relation to those matters.

10. Whether any private operators of cable television systems that might be permitted should be subject to requirements relating to the Australian content of programs or the provision of channels for community services, public access services or special purpose programs, or subject to other special requirements.

11. The copyright and related issues to which the introduction of cable television would give rise.

Continued Page 4

Terms of Reference A.B.T. Inquiry into Cable and Subscription Television services — from Page 2.

12. The means by which the 'hardware' (including ducts, cables, and associated equipment) necessary for the establishment and operation of cable television systems might be provided and the means by which participation by Australian industry in the provision, manufacture, installation and servicing of the necessary equipment might be maximised.

I further direct the Tribunal to make recommendations to me in relation to the above matters following its inquiry.

On December 5, 1980, Mr Staley's successor, Mr Sinclair, announced:

"I have clarified the terms of reference of the cable inquiry to the Broadcasting Tribunal by asking it to examine the question of whether cable television and/or pay television distributed by cable should, in fact, be introduced at all.

"It also needs to be established what the role and purpose of cable television should be in the range of electronic options of education, information and entertainment. The Tribunal will be investigating the social, economic, technical and other implications involved if cable television is introduced into Australia. It is not just a case of examining when and how cable should be introduced.

"I also want to stress that the inquiry will not be investigating subscription television services of the radiated type except to the extent referred to in Item 6 of the Terms of Reference. This asks what effect the introduction of radiated subscription television services may have on any 'pay television' services provided in due course by cable television systems.

"The Chairman of the Tribunal, Mr David Jones, will be asked to extend the date for submissions to March, 1981 so that interested parties can make supplementary submissions if they wish, now that these points have been made clear".

Editor's note:

A number of articles about cable television and similar developments in Australia and overseas are contained in the "Technology Special" issue of *Media Information Australia* No.19 February, 1981. Price $4.50. Available from M.I.A., Box 305, Post Office North Ryde. N.S.W. 2113.

EDITORIAL CONTRIBUTIONS

This first issue of Communications Law Bulletin (CLB) deals with only two topics as it is only a 4-page introductory issue. Future issues are likely to be of at least 8 pages but this will depend on the willingness and capacity of subscribers and readers to contribute.

The range of potential topics is virtually limitless.

Contributions of an authoritative nature are particularly sought.

ALL forms of criticism and correction are actively encouraged to help us attain the high standard of responsible reporting and commentary which is our aim.

SUBSCRIPTIONS AND MEMBERSHIP

The Communications Law Bulletin (CIB) is sent free to all members of the Australasian Communications Law Association (ACLA), a body of people interested in broadcasting law, defamation, copyright, advertising, contempt of court, freedom of information, entertainment law, privacy and censorship.

Membership is not open to organisations or firms, although these are welcome to subscribe to CLB at the institutional rate. Institutions may subscribe for extra copies at $1.00 each (e.g. a $32.00 subscription covers THREE copies of each issue for 12 months).

We suggest you photocopy or transcribe the subscription form below to avoid damaging this copy of CLB which will form part of a volume.

TO: The Secretary,
Australasian Communications Law Association,
C/- Faculty of Law,
University of N.S.W.
P.O. Box 1,
Kensington N.S.W. 2033.

Please enter my personal subscription to CLB for 12 months and send me details of ACLA membership. I enclose my cheque for $20.00.

OR

Please enter the institutional subscription of this firm, organisation, library or other institution for 12 months. Our cheque for $30.00 is enclosed.

Name .....

Address .....

..... Postcode .....

Signed .....